

## **NOTICE OF EFFECTIVE DATE OF REGULATION CHANGE**

### **California Code of Regulations Title 2, Administration Division 1, Administrative Personnel**

**DATE:** August 29, 2002

**TO:** ALL STATE AGENCIES, EMPLOYEE ORGANIZATIONS, AND  
MEMBERS OF THE GOVERNOR'S CABINET

**SUBJECT:** DISCOVERY REGULATIONS IN NON-ADVERSE ACTION  
EVIDENTIARY HEARINGS BEFORE THE STATE PERSONNEL  
BOARD

Under authority established in Government Code § 18701, the State Personnel Board (SPB) has adopted new §§ 57.1 through 57.4 in Title 2 of the California Code of Regulations (2CCR), to provide procedures for conducting discovery in non-adverse action evidentiary hearings conducted before the five-member State Personnel Board or its designated representative. These discovery provisions, which became effective on August 12, 2002, apply to appeals from discrimination or denial of reasonable accommodation under Government Code §§ 19700-19706, and when an appeal is granted from the Notice of Findings issued in relation to a whistleblower retaliation complaint under Government Code §§ 8547.8 and 19683. These provisions also apply when discrimination or retaliation is raised as an affirmative defense during the course of evidentiary hearings concerning appeals from notices of adverse action under Government Code § 19574, notices of rejection during probationary period under Government Code § 19175, notices of medical action under Government Code § 19253.5, and notices of non-punitive action under Government Code § 19585.

The text of the final regulations is attached. These regulations will be published in 2CCR, Division 1, §§ 57.1-57.4.

These new regulations:

1. Clarify which matters are subject to discovery by either party during SPB's evidentiary hearings concerning complaints or appeals from discrimination or retaliation in state service, or when discrimination or retaliation is raised as an affirmative defense during evidentiary hearings concerning notices of adverse action, notices of rejection during probationary period, notices of medical action, and notices of non-punitive action.

2. Set forth the process compelling discovery of requested discovery matters in evidentiary hearings concerning complaints or appeals from discrimination or retaliation in state service, or when discrimination or retaliation is raised as an affirmative defense during evidentiary hearings concerning notices of adverse action, notices of rejection during probationary period, notices of medical action, and notices of non-punitive action.
3. Set forth the process for quashing discovery requests in hearings concerning complaints or appeals from discrimination or retaliation in state service, or when discrimination or retaliation is raised as an affirmative defense during evidentiary hearings concerning notices of adverse action, notices of rejection during probationary period, notices of medical action, and notices of non-punitive action.

CONTACT PERSON:

Please contact Elise Rose at (916) 653-1403 or TDD (916) 653-1498 for additional information regarding this action. The backup agency contact for this action is Steve Unger at the State Personnel Board, P.O. Box 944201, Sacramento, CA 94244-2010, (916) 651-8461 or TDD (916) 653-1498. Questions regarding the substance of these regulations should be directed to the contact person. Questions regarding the regulatory process in conjunction with these regulations should be directed to the backup contact person.

Mike Willihnganz  
Chief, Policy Division

Attachment: Text of Final Regulations

## Discovery Regulations in Non-Adverse Action Evidentiary Hearings

**All new text is indicated by underline.**

### Title 2. ADMINISTRATION

#### Division 1. Administrative Personnel

#### Chapter 1. State Personnel Board

#### **§ 57.1. Discovery in Evidentiary Hearings other than Adverse Actions; Exclusive Provisions.**

The provisions of Sections 57.2-57.4 provide the exclusive right to and method of discovery for evidentiary hearings conducted before the Board and/or Board administrative law judges concerning appeals from discrimination (Sections 54 and 54.2), and when a petition for hearing is granted from the Notice of Findings issued in relation to a complaint of whistleblower retaliation (Sections 56-56.8). These provisions shall also apply when discrimination or retaliation is raised as an affirmative defense in an answer or appeal filed with the Board pursuant to the provisions of Section 63 concerning Notices of Adverse Action (Government Code Sections 19575, 19590), Rejections During Probationary Period (Government Code Section 19175), Medical Actions (Government Code Section 19253.5), and Non-Punitive Actions (Government Code Section 19585).

NOTE: Authority cited: Section 18701, Government Code.

Reference: Section 87164, Education Code; Sections 8547.8, 18670, 18671, 18672, 18672.1, 18673, 18675, 19175, 19253.5, 19575, 19585, 19590, 19683, 19700-19706, Government Code.

#### **§ 57.2. Request for Discovery; Statements; Writings; Investigative Reports; Witness List.**

(a) Each party to the appeal is entitled to serve a request for discovery on any other named party to the complaint or appeal as allowed by subdivisions (c) – (e), and Government Code Section 18673. All requests for discovery shall be made no later than **36** days prior to the initial hearing date, except upon a petition and showing of good cause by the party seeking discovery, and a finding by the administrative law judge, in his or her sole discretion, that such additional discovery should be permitted in

the furtherance of justice. For purposes of this section, the term “party” is defined as the person, to include appointing powers, filing the appeal, and his or her designated legal representative, as well as any person, to include appointing powers, specifically identified in the appeal as a named respondent, and his or her designated legal representative.

(b) When an appeal is amended, all parties, other than the amending party, may serve a request for discovery on any other party to the appeal within 5 days of service of the amended appeal. Such requests for discovery shall be limited solely to those additional issues, if any, raised in the amended appeal. The administrative law judge may, in his or her discretion, extend the time period for requesting discovery under this subdivision upon a showing of good cause.

(c) Each party to the appeal is entitled to request and receive from any other party to the appeal the names and home or business addresses of percipient witnesses to the event(s) in question, to the extent known to the other party, unless disclosure of the address is prohibited by law. Each party to the appeal is also entitled to request and receive from any other party to the appeal the names and addresses of individuals who may be called as witnesses to testify during the course of the hearing. The responding party may, in his or her discretion, provide either the home or business address of the witness, unless disclosure of the address is prohibited by law.

(d) Each party to the appeal is entitled to inspect and make a copy of any of the following in the possession, custody, or control of any other party to the appeal:

(1) Statements, as that term is defined in Evidence Code Section 225, of witnesses then proposed to be called as witnesses during the hearing by the party and of other persons having personal knowledge of the act, omission, event, decision, condition, or policy which are the basis for the appeal;

(2) All writings, as that term is defined in Evidence Code Section 250, that the party then proposes to enter into evidence;

(3) Any other writing or thing that is relevant to the appeal; and

(4) Investigative reports made by or on behalf of any party to the appeal pertaining to the subject matter of the proceeding, to the extent that these reports: (A) contain the names and home or business addresses of witnesses or other persons having personal knowledge of the facts, omissions or events which are the basis for the proceeding, unless disclosure of the address is prohibited by law, or (B) reflect matters perceived by the investigator in the course of his or her investigation, or (C) contain or include by attachment any statement or writing described in (A) to (C), inclusive, or summary thereof.

(e) For the purpose of this section, in those instances where an audio tape recording is provided, and all or portions of the tape are inaudible due to poor tape

quality, the producing party shall, upon the request of the party requesting the discovery, provide a second, more audible, version of the tape recording, if possible. In those instances where a better quality tape recording does not exist, the producing party shall provide a copy of a written transcript of the tape recording, if such transcript exists. The producing party shall not be required to produce a copy of a written transcript for any requested tape recording, if such transcript does not already exist.

(f) All parties receiving a request for discovery shall produce the information requested within 12 days of receipt of the discovery request, or shall serve a written response on the requesting party clearly specifying which of those requested matters will not be produced and the basis for the non-production.

(g) Nothing in this section shall authorize the inspection or copying of any writing or thing which is privileged from disclosure by law or otherwise made confidential or protected as the attorney's work product.

(h) For purposes of this section, service may be accomplished by mailing the request for discovery to the home or business address of the party from whom discovery is sought. Each request for discovery shall have attached a proof of service.

NOTE: Authority cited: Section 18701, Government Code.

Reference: Section 87164, Education Code; Sections 225, 250, Evidence Code; Sections 8547.8, 18670, 18671, 18672, 18672.1, 18673, 18675, 19683, 19700-19706, Government Code.

### **§ 57.3. Petition to Compel Discovery.**

(a) Any party claiming his or her request for discovery pursuant to Section 57.2 has not been complied with may serve and file with the administrative law judge a petition to compel discovery, naming as responding party the party refusing or failing to comply with Section 57.2. A copy of the petition shall be served on the responding party on the same date the petition is filed with the administrative law judge. For purposes of this section, service may be effected on the responding party by mailing a copy of the petition to compel discovery, with proof of service attached, to the home or business address of the responding party.

(b) The petition shall state facts showing the responding party failed or refused to comply with Section 57.2, a description of the matters sought to be discovered, the reason or reasons why the matter is discoverable under that section, that a reasonable and good faith attempt to contact the responding party for an informal resolution of the issue has been made, and the grounds of the responding party's refusal so far as known to the moving party.

(c) The petition shall be served upon the administrative law judge and responding party within 5 days after the responding party refused or failed to comply with the request, or within another time provided by stipulation, whichever period is

longer. However, no petition may be filed within 15 days of the date set for commencement of the initial hearing date, except upon petition and determination by the administrative law judge of good cause. In determining good cause, the administrative law judge shall consider the necessity and reasons for the discovery, the diligence or lack of diligence of the moving party, whether the granting of the petition will delay commencement of the hearing on the date set, and the possible prejudice of the action to any party.

(d) The responding party shall have a right to file a written answer to the petition. Any answer shall be served on the administrative law judge and the petitioner within 5 days of the service of the petition to compel discovery. For purposes of this section, service may be effected on the petitioner by mailing a copy of the answer, with proof of service attached, to the home or business address of the petitioner.

(e) Where the matter sought to be discovered is in the possession, custody, or control of the responding party and the responding party asserts that the matter is not a discoverable matter under Section 57.2, or is privileged or otherwise exempt from disclosure, the administrative law judge may order lodged with him or her matters that are provided in Section 915(b) of the Evidence Code and shall examine the matters in accordance with the provisions thereof.

(f) Unless otherwise stipulated by the parties and as provided by this section, the administrative law judge shall review the petition and any response filed by the respondent and issue a decision granting or denying the petition within 5 days of receipt of the responding party's answer to the petition to compel discovery or, if no answer is submitted, within 5 days of the date that such answer was due. Nothing in this section shall preclude the administrative law judge from determining that an evidentiary hearing on the petition shall be conducted prior to the issuance of a decision on the petition. The parties may appear at any such hearing via telephone. The administrative law judge shall decide the petition on the matters examined in camera, the papers filed by the parties, and such oral argument and additional evidence as the administrative law judge may allow.

(g) The order granting the petition, in whole or in part, shall be in writing and set forth the matters the moving party is entitled to discover under Section 57.2. The administrative law judge shall serve a copy of the order upon the parties by mail, and/or by facsimile transmission. Where the order grants the motion in whole or in part, the order shall be effective on the date the order is served, and shall specifically state the date on which production is due. Where the order denies relief to the moving party, the order shall be effective on the date it is served.

(h) The administrative law judge may, upon his or her own motion, or upon the motion of one or more parties to the action and upon a showing of good cause, exercise his or her discretion to continue the initial hearing date in order to resolve any contested discovery issues.

(i) A ruling of the administrative law judge concerning a motion to compel the production of evidence or to compel the attendance of a witness is subject to review in the same manner and to the same extent as the Board's final decision in the proceeding. A party applying for judicial relief from the decision of the Board or the administrative law judge concerning any disputed discovery issue shall give notice to the Board and all other parties to the action. The notice may be either oral at the time of the administrative law judge's decision, or written at the same time application is made for judicial relief. The hearing shall be continued pending resolution of any such interlocutory appeal.

NOTE: Authority cited: Section 18701, Government Code.  
Reference: Section 87164, Education Code; Section 915, Evidence Code; Sections 8547.8, 18670, 18671, 18672, 18672.1, 18673, 18675, 19683, 19700-19706, Government Code.

#### **§ 57.4. PETITION TO QUASH OR FOR PROTECTIVE ORDER.**

(a) Any party claiming that a request for discovery pursuant to Section 57.2 is improper under that section or is otherwise privileged or exempt for discovery, may object to its terms by serving and filing with the administrative law judge and the party requesting the disputed discovery, a petition to quash or for a protective order. The petition shall state: (1) a description of the matters sought to be discovered; (2) the reason(s) why the matter is not discoverable under Section 57.2, or is otherwise privileged or exempt from discovery; and (3) that a reasonable and good faith attempt has been made to contact the requesting party and resolve the matter informally.

(b) The petition shall be served upon the administrative law judge and the party requesting discovery within 10 days after the moving party was served with the discovery request, or within another time provided by stipulation, whichever period is longer. No petition may be filed after the applicable time period has expired except upon petition and a determination by the administrative law judge of good cause. In determining good cause, the administrative law judge shall consider the necessity and reason(s) for the petition, the diligence or lack of diligence of the petitioning party, whether the granting of the petition will delay commencement of the hearing on the date set, and the possible prejudice of the action to any party. For purposes of this section, service may be effected on the party requesting discovery by mailing a copy of the petition, with proof of service attached, to the home or business address of the party requesting discovery.

(c) The party requesting discovery shall have a right to file a written answer to the petition. Any answer shall be served on the administrative law judge and the petitioner within 5 days of the service of the petition to quash and/or for a protective order. For purposes of this section, service may be effected on the petitioner by mailing a copy of the answer, with proof of service attached, to the home or business address of the petitioner.

(d) Where the matter sought to be protected is in the possession, custody or control of the moving party, and the moving party asserts that the matter is not a discoverable matter under the provisions of Section 57.2, or is otherwise privileged or exempt from discovery, the administrative law judge may order lodged with him or her matters provided in Section 915(b) of the Evidence Code and examine the matters in accordance with those provisions.

(e) Unless otherwise stipulated by the parties, and as provided in this section, the administrative law judge shall review the petition and any response filed by the responding party and issue a decision granting or denying the petition within 5 days of receipt of the responding party's answer to the petition. Nothing in this section shall preclude the administrative law judge from determining that an evidentiary hearing on the petition shall be conducted prior to the issuance of a decision on the petition. The parties may appear at any such hearing via telephone. The administrative law judge shall decide the case on the matters examined in camera, the papers filed by the parties, and such oral argument and additional evidence as the administrative law judge may allow.

(f) The order granting the petition, in whole or in part, shall be in writing and set forth the matters the moving party is not required to produce to the party seeking discovery under Section 57.2. The administrative law judge shall serve a copy of the order upon the parties by mail, and/or by facsimile transmission. Where the order grants the motion in whole or in part, the order shall be effective on the date the order is served, and shall specifically state the date on which production, if any, is due. Where the order denies relief to the moving party, the order shall be effective on the date it is served.

(g) A ruling of the administrative law judge concerning a petition to quash or for a protective order is subject to review in the same manner and to the same extent as the Board's final decision in the proceeding. A party applying for judicial relief from the decision of the Board or the administrative law judge concerning any disputed discovery issue shall give notice to the Board and all other parties to the action. The notice may be either oral at the time of the administrative law judge's decision, or written at the same time application is made for judicial relief. The hearing shall be continued pending resolution of any such interlocutory appeal.

(h) The administrative law judge may, upon his or her own motion, or upon the motion of one or more parties to the action and upon a showing of good cause, exercise his or her discretion to continue the initial hearing date in order to resolve any contested discovery issues.

NOTE: Authority cited: Section 18701, Government Code.

Reference: Section 87164, Education Code; Section 915, Evidence Code; Sections 8547.8, 18670, 18671, 18672, 18672.1, 18673, 18675, 19683, 19700-19706, Government Code.